Illustrative of a further objection to this doctrine is a recent case, *McNamara* v. *McNamara* (Neb. 1910), 126 N. W. 94, in which it was argued that a court of equity might, consistently with the theory of due process of law, strike out the defendant's answer to the merits of an action for divorce and enter a decree *pro confesso* because of his failure to pay temporary alimony *pendente lite*. In discussing the question the court, besides expressing its disapproval of the New York cases on principle, very properly pointed out the further fact that in such actions the public interest is involved to such an extent in the preservation of the marriage status[23] that to allow the defendant's answer to be stricken out in such cases might be considered against public policy. Surely, the introduction of this doctrine would in many cases lead to the granting of divorces on evidence which, because of the lack of opportunity to defend, might easily, if controverted, have been found insufficient or false.[24]. It seems, therefore, that both as a matter of principle and policy the decision of the court was a proper one.

THE CONSTITUTION AS A LIMITATION ON THE STATES POWER IN THE EXECUTION OF A TRUST CREATED BY CONGRESS.—The problem presented to the court in the case of the *Great Northern Railroad Co.* v. *Minnesota* (1910) 30 Sup. Ct. Rep. 344, suggests an inquiry as to the validity of the contention that a State, in dealing with land granted to it by Congress in trust for certain specific purposes, may, in carrying out the object of the grant, deal with the property without regard to the provisions of its constitution. The question has arisen in connection with lands conveyed to the State in furtherance of a congressional plan to aid in the construction of a particular line of railroad, and it has been said that, notwithstanding a direct constitutional provision that all land should be taxed according to its value in money,[1] the legislature might, in order best to carry out the purposes of the trust, convey the lands to a railroad company exempt from taxation.

It is undoubtedly true that a State may maintain the position of a trustee, and, as such, may administer the trust through its legislative powers.[2] Having voluntarily assumed this relation, it then becomes subject to the usual obligations attaching to that capacity and consequently must exert its powers to their fullest extent in furtherance of the purpose of the trust.[3] It does not seem, however, that the assumption of such a relation would, of itself, place upon it any duties, or give it any powers, inconsistent with the express limitations of its constitution. It has been suggested, however, that the State, in carrying out the provisions of the contract from which the trust arose, was engaged, not in the execution of its constitutional obligations to its people, but of its contract obligation to the United States, and having accepted the trust, must have all the freedom of judgment necessary to the complete performance of its obligations.[4] This argu-

[23]Trough *v.* Trough (1906) 59 W. Va. 464.

[24]Gordon *v.* Gordon *supra.*

[1]Constitution of Minn. Art. 9, sec. 3.

[2]Perry, Trusts (5th ed.) § 41; U. S. Stat. (1836) c. 252; U. S. Stat. (1846) c. 178.

[3]Lowry *v.* Francis (Tenn. 1831) 2 Yerg. 534.

[4]Stearns *v.* Minn. (1900) 179 U. S. 223, 253. (Opinion by Brewer, J.)

ment seems, in effect, to concede to the Federal Government an authority, by imposing conditions on a grant, to enlarge thereby the constitutional powers of the state legislature. It is undoubtedly true that Congress, in disposing of its public lands, may grant them subject to such conditions as it considers will best accomplish the purpose for which the cession is made. To say, however, that the imposition of such conditions will give the State unrestrained freedom to deal with these lands, is to overlook the fact that the State, in accepting the contract, must be presumed to have acted with due regard to its own limitations.[5] Nor would the fact that Congress, as grantor of the trust, retains an interest in its execution, appear to alter the situation. To be sure, Congress, exercising its reserved power of disposition, might, by retaining in itself a sufficient legal interest, prevent the property from coming within the constitutional provision as to taxation until it reached the hands of a purchaser for value.[6] In the same way it might deal with the State and, under such circumstances, title never having completely passed from the Federal Government, the property would not become subject to the constitutional provisions, even after conveyance by the legislature. When, however, title is passed absolutely to the State, subject only to the condition that it be used for the purpose of the trust, the property then becomes subject to the constitutional provision, and in devoting it to the designated purposes, the legislature must act in subordination to the constitution.[7] Nor would it seem of avail to argue that by virtue of the trust agreement, the land never passed into the general mass of the state property, and consequently, the legislature, dealing with it in an individual capacity, would not be bound by its constitution. In this connection it is to be observed that, except for *dicta* in a few state decisions,[8] the doctrine of dual capacity has never been recognized in this country,[9] and to invoke it in these cases would seem but a means of evading a direct constitutional provision. Even admitting its applicability, it is not apparent, in view of the fact that all liens of the United States have been extinguished, how the State, acting as an individual, could impose upon the property a status by virtue of which it could remain exempt from the provisions of the state constitution.

It would seem, therefore, that Congress, neither by virtue of its interest in the execution of the trust, nor by the direct exercise of its power of contract, could confer upon the legislature a right to violate the state constitution. On the other hand, since the constitution is the measure of the authority of the legislature, any contract which in its performance would involve the exercise of a prohibited power, must necessarily be void. The obvious and proper construction of such an agreement would, therefore, demand that the parties be considered as having contemplated that the trust should be executed in accordance with the powers, and under the restrictions, imposed by the state constitution.[10]

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[5]Stearns *v.* Minn. *supra* (opinion by White, J.); Haire *v.* Rice (1906) 204 U. S. 291.

[6]Railway Co. *v.* Prescott (1872) 16 Wall 603; Railway Co. *v.* McShane, (1874) 22 Wall. 444.

[7]Haire *v.* Rice *supra.*

[8]See St. Paul & Pac. R. R. Co. *v.* Parcher (1869) 14 Minn. 297, 329.

[9]See Van Brocklin *v.* State of Tenn. (1885) 117 U. S. 151.

[10]Haire *v.* Rice *supra.*